



0000153308

BEFORE THE ARIZONA CORPORATION

RECEIVED

COMMISSIONERS

2014 MAY -9 A 11:38

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

AZ CORP COMMISSION
DOCKET CONTROL

ORIGINAL

In the matter of)

KENT MAERKI and NORMA JEAN)
COFFIN aka NORMA JEAN MAERKI, aka)
NORMA JEAN MAULE, husband and)
wife,)

DENTAL SUPPORT PLUS FRANCHISE,)
LLC, an Arizona limited liability company)

Respondents.)

DOCKET NO. S-20897A-13-0391

**MOTION FOR TELEPHONIC
TESTIMONY**

Arizona Corporation Commission

DOCKETED

MAY 09 2014

DOCKETED BY

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Alfred Earl Holyoak, Dr. Edwin Kopler, Jeff Eschrich, Glen Lacy and/or Edward Manzio during the hearing in the above-referenced matter. Each prospective witness possesses knowledge relevant to matters in dispute. All of the witnesses, with the exception of Lacy and Manzio, reside outside the state. Lacy resides in Arizona however spends summers in Nebraska. Although Manzio is an Arizona resident, he will be out of state during the scheduled hearing to attend to a family matter. Requiring them to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to appear and give testimony telephonically solves this problem while facilitating the preservation and introduction of relevant information and a full opportunity for questioning by all parties. Accordingly, good cause

...

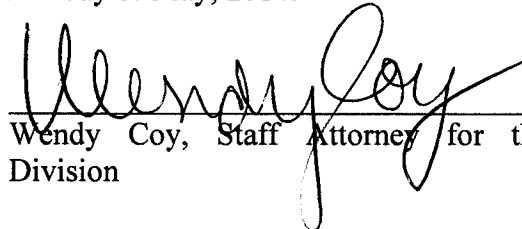
...

...

...

1 exists for granting such leave and doing so would not infringe upon the Respondents' procedural
2 due process rights. For these reasons, which are more thoroughly addressed in the following
3 Memorandum of Points and Authorities, this motion should be granted.

4 RESPECTFULLY SUBMITTED this 9th day of May, 2014.

5 
6 Wendy Coy, Staff Attorney for the Securities
7 Division
8

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Introduction**

11 The Securities Division ("Division") of the Arizona Corporation Commission
12 ("Commission") anticipates calling Alfred Earl Holyoak, Dr. Edwin Kopler, Jeff Eschrich, Glen
13 Lacy and/or Edward Manzio as central witnesses during the hearing in this matter. Alfred Earl
14 Holyoak, Glen Lacy and Edward Manzio are investors in the investments referenced in the Notice,
15 and can provide probative testimony that supports a number of the allegations brought by the
16 Division. Dr. Edwin Kopler is a dentist in the program and Jeff Eschrich was a salesperson for the
17 program. The burden of traveling to Phoenix to provide testimony in person, however, is
18 impractical for these witnesses because Holyoak resides in Idaho, Kopler resides in Louisiana,
19 Eschrich resides in California, Lacy resides in Nebraska during the summer months and, Manzio
20 will be traveling to Minnesota for a family matter. The simple and well-recognized solution to this
21 problem is to permit them to testify telephonically. Through this manner, not only will relevant
22 evidence be preserved and may be introduced, but all parties will have a full opportunity for
23 questioning, whether by direct or cross-examination of these witnesses.

24 ...

25 ...

26 ...

1 **II. Argument**

2 **A. Good cause exists for permitting telephonic testimony.**

3 “When considering telephonic testimony, the initial inquiry should be whether good cause
4 has been shown for its use.” *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409
5 (2010). “In determining whether good cause has been demonstrated, the court may consider
6 whether the hearing can conveniently be continued to allow in-person testimony.” *In re HM*, 225
7 Ariz. at 181 n.4, 236 P.3d at 408 n.4. “It may also consider the costs of bringing experts or other
8 witnesses to court....” *Id.* In the instant case, the above witnesses possess relevant knowledge of
9 the subject investment offer and sale, the Respondents’ business practices, and related documents,
10 but, because they reside in other states, or will be out-of-state for various reasons, they are
11 practically unavailable for in-person testimony.

12 The majority of the witnesses are not merely out of town on the dates set for hearing, but
13 live out of state. They would be unavailable to testify in person even on a rescheduled hearing
14 date. Although Lacy and Maznio may be available to testify in person on a rescheduled date, it is
15 more practical to allow them to testify telephonically during the Division’s case in chief given that
16 the Division’s other witnesses have made themselves available for the current hearing dates in
17 June. Additionally, the cost of bringing the witnesses to Phoenix would be prohibitively expensive
18 for the Division. Permitting the witnesses to appear telephonically would greatly reduce the
19 burden of presenting their testimony on both the witnesses and the Division.

20 Therefore, good cause exists for permitting the above-referenced witnesses to testify by
21 telephone.

22 **B. Permitting telephonic testimony does not infringe upon the Respondent’s procedural**
23 **due process rights and is within the Commission’s administrative rules and practice.**

24 Upon finding good cause for using telephonic testimony, consideration should be given to
25 “whether admission of telephonic testimony comported with due process.” *In re HM*, 225 Ariz. at
26 182, 236 P.3d at 409. What constitutes due process “is not a technical conception with a fixed
content unrelated to time, place and circumstances,” but, rather, takes into account “such

1 procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319,
2 334 (1976) (internal quotations omitted). In a civil administrative proceeding, procedural due
3 process requires balancing: (1) the individual’s interests; (2) government’s interests; and (3) the
4 “likely impact of telephonic testimony on the accuracy and fairness of the process.” *In re HM*, 225
5 Ariz. at 182, 236 P.3d at 409.

6 The competing interests are protected by procedural safeguards inherent in telephonic
7 testimony. Individuals have an interest in due process, property and liberty. Government interests
8 typically include, among other things, protecting the public from harm (*id.*) and in “conserving
9 fiscal and administrative resources.” *Mathews*, 424 U.S. at 347-48. Witnesses appearing by
10 telephone are subject to cross examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.
11 Moreover, telephonic testimony “preserves paralinguistic features such as pitch, intonation, and
12 pauses that may assist an ALJ in making determinations of credibility.” *T.W.M. Custom Framing*
13 *v. Indus. Comm’n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000). At the same time,
14 appearing telephonically preserves state resources that would otherwise have to be spent on travel
15 and accommodations. Accordingly, telephonic testimony “does not significantly increase the risks
16 of an erroneous deprivation.” *In re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

17 Permitting telephonic testimony would have minimal negative impact on the accuracy and
18 fairness of the evidentiary process. The witnesses at issue, though appearing by telephone, would
19 be still be subject to cross examination by the Respondents and the Court could still make
20 determinations of credibility based the manner in which the witnesses testify. Furthermore,
21 permitting telephonic testimony would enable the Division to present evidence that furthers the
22 Commission’s interests in protecting the public from the harm allegedly committed by the
23 Respondents and in conserving its financial and administrative resources. Therefore, permitting
24 the above witnesses to testify by telephone does not infringe upon the Respondents’ procedural
25 due process rights.

1 In addition, the Arizona Corporation Commission promulgated the Commission's Rules of
2 Practice and Procedure that are intended to "be liberally construed to secure just and speedy
3 determination of all matters presented to the Commission." *See* A.A.C. R14-3-101(B). They
4 encompass the use of other forms of testimony during administrative hearings. More specifically,
5 Rule R14-3-109 states, "In conducting any investigation, inquiry, or *hearing*, neither the
6 Commission, nor any officer or employee thereof shall be bound by the technical rules of
7 evidence, and no informality in any proceeding or *in the manner of taking of testimony* shall
8 invalidate any order, decision, rule, or regulation made, approved, or confirmed by the
9 Commission." *See* A.A.C. R14-3-109(K) (emphasis added).

10 In light of the relaxed evidentiary and procedural rules governing administrative hearings
11 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
12 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
13 telephonic testimony in its administrative hearings to introduce probative evidence. *See, e.g., In*
14 *the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*
15 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*
16 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services*
17 *Corporation et al.*, Docket No. S-03177A-98-0000. Therefore, permitting the above witnesses to
18 testify by telephone is consistent with the rules and customary practice in administrative hearings
19 before the Commission.

20 **III. Conclusion**

21 Permitting Alfred Earl Holyoak, Dr. Edwin Kopler, Jeff Eschrich, Glen Lacy and/or
22 Edward Manzio to testify telephonically at the upcoming administrative hearing allows the
23 Division to present relevant witness evidence that is expected to be reliable and probative, is

24 ...

25 ...

26 ...

1 fundamentally fair, and does not compromise Respondents' due process rights. Therefore, the
2 Division respectfully requests that its motion for leave to present such telephonic testimony be
3 granted.

4 RESPECTFULLY SUBMITTED this 9th day of May, 2014.

5 
6 Wendy Coy, Staff Attorney for the Securities
7 Division
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 SERVICE LIST FOR: KENT MAERKI and NORMA JEAN COFFIN aka NORMA JEAN
2 MAERKI, aka NORMA JEAN MAULE, husband and wife, DENTAL SUPPORT PLUS
3 FRANCHISE, LLC

4 ORIGINAL and 9 copies of the foregoing
5 filed this 9th day of May, 2014, with:

6 Docket Control
7 Arizona Corporation Commission
8 1200 W. Washington St.
9 Phoenix, AZ 85007

10 COPY of the foregoing hand-delivered
11 this 9th day of May, 2014, to:

12 The Honorable Marc E. Stern
13 Administrative Law Judge
14 Arizona Corporation Commission
15 1200 W. Washington St.
16 Phoenix, AZ 85007

17 COPY of the foregoing mailed
18 this 9th day of May, 2014, to:

19 Kent Maerki
20 10632 N. Scottsdale Road, #B-479
21 Scottsdale, Arizona 85254

22 Norma Jean Maerki
23 10632 N. Scottsdale Road, #B-479
24 Scottsdale, Arizona 85254

25 Dental Support Plus Franchise, LLC
26 10632 N. Scottsdale Road, #B-479
Scottsdale, Arizona 85254

